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80-1213

Supreme Court of the United States

October Term, 1980

EILEEN ELDORADO JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the second sentence of Rule 404(b), Federal Rules of Evidence, license the prosecutor to offset the petitioner's showing of her good general reputation, by eliciting from the government's rebuttal witness hearsay insinuations of specific dishonest and unlawful acts not charged in the indictment?

2. On her trial pursuant to indictment charging willful understatements of her taxable income, was the petitioner-physician denied due process when the district judge instructed the jurors that *they* were to determine whether she had filed fraudulent claims for Medicaid as the government's rebuttal character witness had insinuated?

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No. 80-

In The

Supreme Court of the United States

October Term, 1980

EILEEN ELDORADO JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 12, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit will be published, ____ F. 2d ____, and is set out in the Appendix, 1a-7a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit is dated and was entered on November 12, 1980. The order of that court denying rehearing is dated December 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Fifth Amendment to the Constitution of the United States which, in pertinent part, provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Although not specifically said below, the rights of the petitioner asserted at every stage of this case have the further protection of the Sixth Amendment, *viz.*:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury . . . and to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him . . .".

This case also involves Rule 404(b) of the Federal Rules of Evidence which provides as follows:

> "Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.
>
> * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF THE CASE

The indictment, in three counts, charged that the petitioner had willfully and knowingly attempted to evade and defeat a large part of the income tax due by her to the United States by reporting a taxable income of $-0- instead of $9,017.99 for the year 1972, and a taxable income of $-0- instead of $31,336.16 for the year 1973 and a taxable income of $11,980.25 instead of $29,274.71 for the year 1974, all in violation of Title 26, United States Code, §7201.

The case was tried by a jury in Lynchburg, Virginia between May 29 and June 6, 1979. After the government had rested its case in chief and the petitioner and her witnesses, including seven character witnesses, had testified and rested, the government, in rebuttal, called one Robert Henry Pemberton, an employee at H.E.W. Audit Agency in Richmond, Virginia as a "character witness" (V-T234).[1]

Mr. Pemberton testified that he made a review of Dr. Johnson's (the petitioner's) medical services for the period February 1976 through January 1979 (V-T237) to identify potential for fraud in the Medicaid program (V-T234). He found that the petitioner billed for four times as many services per

1. "V-T" refers to pages of Volume V (and "VI-T" to Volume VI) of the Transcript of Testimony.

patient as other physicians in the state and that she had billed for medical services which were not recorded on her patients' charts; (V-T237-240) and he had been told by some of her patients that they had not received services for which Dr. Johnson had billed (V-T238). Based on his review, he concluded that the truthfulness of the petitioner was questionable.

Defense counsel objected to the study as not being rebuttal of anything previously shown and objected to the witness' testifying to what he had learned from others (V-T234-5). The petitioner again testified, in attempted refutation of Pemberton's testimony (VI-T3, *et seq.*). On cross-examination, she was asked: "Who would have received the benefit then of all the fraudulent forms for Medicaid that were filed?" Counsel for the petitioner objected to the question and made a motion for a mistrial (VI-T8). The motion was overruled (VI-T11). Subsequently, counsel for the defense moved for a new trial, arguing that the petitioner had been prejudiced by the testimony of Pemberton (VIII-T21).

The jury convicted on all counts and the court sentenced the petitioner to pay a fine of $8,000 on each of the three counts, suspended execution of all but $3,500 of the fine, and suspended the imposition of any sentence of imprisonment, placing the petitioner on probation for 2 years. In an opinion by Judge Phillips in which Judge Russell concurred, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of conviction on November 12, 1980, Judge Widener dissenting. Petition for rehearing suggesting rehearing *en banc* was denied on December 17, 1980.

STATEMENT OF FACTS

The petitioner has been engaged in the general practice of medicine in Lynchburg, Virginia since 1967. Upon the death of her brother in 1971, she "inherited" the practice which he had commenced many years before she joined him in Lynchburg. She filed tax returns for 1972, 1973 and 1974, which understated her income by approximately $120,000 and her tax liability by $31,000.

The petitioner testified that records of her income were kept by her office help, that she never had anything to do with the money and had "never had any occasion to hide any". (V-T125-129, 138-9). The entries of receipts for medical services were made by her employees and she did not check behind them. "When it was time to prepare the income return Mrs. Allar kept the figures and we prepared it together and she would tell me what headings to put, and that's how it was done at the last minute." (V-T147-8). From such memoranda, the tax returns were prepared by a professional who would tell the petitioner where she should sign the return and what tax she owed. She would write a check for what she was informed was her tax liability. The petitioner testified that she did not know how to prepare an income tax return, that she had never attempted to prepare one and that she had no idea how much money she was making (V-T145-149, 152, 167-168).

The petitioner showed that it was difficult for her to employ competent clerical help. In 1976 she engaged another accountant to set up for her a bookkeeping system and to instruct her employee, Mrs. Allar, how the accounts should be kept. That accountant testified to Mrs. Allar's inaptness in keeping the accounts even after he had set up and explained the simplified system for doing so (V-T190-198).

Seven witnesses, including professional colleagues, testified that the petitioner was reputed to be a law abiding citizen and had a good reputation for truth and veracity (V-T96-117, 231-2); and one of them testified to the difficulty in obtaining competent clerical help (V-T117).

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The indictment having charged offenses against the laws of the United States (Title 26 U.S.C. §7201), the district court had jurisdiction pursuant to Title 18 U.S.C. §3231.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the majority below is in conflict with the rule which it cites and with other decisions of that court and other courts of appeals.

The majority below seems to have perceived that the government's attorneys had a duty "to rebut evidence [of good general reputation] designed to plant in the jury's mind a reasonable doubt that [the defendant] could have possessed the culpability of mind requisite to convict of the crime charged", even though such evidence was unquestionably true. The majority suggests that because, in this case, the petitioner's evidence of her good reputation *was* unassailable in any of the conventional and ordinarily permissible ways, the government was justified in doing exactly what is forbidden by the first sentence of Rule 404(b) of the Federal Rules of Evidence and by the case law in that circuit and in other circuits, *viz.*:

> "Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.
>
> * * *
>
> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. . . ."

In *Eley v. United States,* 117 F. 2d 526 (6th Cir. 1941) the same principle was thus stated:

> "It is a rule long settled by both state and federal decisions that proof of good reputation for particular traits of character may be met only by proof of reputation that such characteristics are not possessed, and is not to be traversed by a showing of specific acts which might denote bad character if established, or create a bad reputation if within general public knowledge. Reuben v. United States, 7 Cir., 86 F. 2d 464." (117 F. 2d at 528).

In *United States v. Davenport,* 449 F. 2d 696 (5th Cir. 1971) this exposition was given:

> "The only type of evidence admissible to show defendant's character is proof of his reputation in the community. Steinberg v. United States, 5th Cir. 1947, 162 F. 2d 120. Specific acts of misconduct cannot be shown. Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); French v. United States, 5th Cir. 1956, 232 F. 2d 736. If the defendant offers

> evidence of his reputation for good character, the government may rebut by evidence that his reputation is bad. Michelson v. United States, *supra.* This evidence, however, is limited to testimony concerning reputation only. Proof of specific acts of misconduct is still not admissible. Curtis Publishing Co. v. Butts, 5th Cir. 1965, 351 F.2d 702; United States v. Beno, 2d Cir. 1963, 324 F. 2d 582; McCormick, Evidence §158, at 337 (1954)." (449 F. 2d at 699).

In *United States v. Curry*, 512 F. 2d 1299 (4th Cir. 1975), *cert. denied*, 423 U.S. 832, the court below reversed a conviction because the government's rebuttal witness testified:

> "About a year ago I had information he was dealing in drugs."

There, the court said: "[T]he prosecution is not permitted to elicit testimony from its own rebuttal witnesses concerning *specific traits* of the defendant for the sole purpose of repudiating the defendant's evidence of his *general reputation.*" (512 F. 2d at 1305; emphasis by the court).

The promulgation of the Federal Rules of Evidence did not effect a change in the law as it had been variously stated. In *United States v. Benedetto*, 571 F. 2d 1246, 1249-50 (2nd Cir. 1978) the court gave this discussion:

> "However, character evidence has long been admissible only in the form of reputation and not in the form of a recitation of good or bad acts. See *Michelson v. United States*, 335 U.S. 469, 477, 69 S. Ct. 213, 93 L. Ed. 168 (1948); Fed. R. Evid. 405(a).[5] Furthermore, while a character

> witness may be asked on *cross-examination* about 'specific instances of conduct,' such acts may not be proved by extrinsic evidence of the sort offered here. That the defense improperly attempted to establish defendant's good character by reference to specific good acts did not justify the prosecution's use of testimony concerning bad acts either in its direct case or in rebuttal. See *United States v. Beno*, 324 F. 2d 582 (2d Cir. 1963), aff'd after remand, 333 F. 2d 669 (2d Cir.), cert. denied, 379 U.S. 880, 85 S. Ct. 147, 13 L. Ed. 2d 86 (1964)." (Footnote omitted.) (Emphasis by the court.)

And, further commenting on the Federal Rules of Evidence, the court in the *Benedetto* case said, at footnote 5:

> "5. It should be noted that the new Federal Rules of Evidence, also allow character testimony in the form of opinion. Fed. R. Evid. 405 and 608. The general prohibition against direct testimony about specific acts is continued. See id. Furthermore, the exception for testimony about specific acts in Rule 405(b) is inapplicable here, since appellant's character was not 'an essential element of [the] charge . . . .' Fed. R. Evid. 405(b). See *United States v. Kahan*, 479 F. 2d 290, 293 (2d Cir. 1973), rev'd on other grounds, 415 U.S. 239, 94 S. Ct. 1179, 39 L. Ed. 2d 297 (1974) (evidence of prior performance of official duty without bribe-taking inadmissible in bribery prosecution)."

In *United States v. Reese*, 568 F. 2d 1246, 1250 (6th Cir. 1977), the court took the occasion again to point to the rule cited by the court below as authority that —

> "Evidence of other crimes, wrongs or acts is not admissible on the issue of the character of the accused or the criminal propensity of the accused in order to show that he acted in conformity therewith. Fed. R. Evid. 404(b); . . ."

In its brief in the court below, the government argued that "Mr. Pemberton's testimony was proper pursuant to Federal Rules of Evidence 405(b), which allows specific instances of conduct to be admitted as rebuttal when specific character traits are essential elements of the charge or defense" and that "the specific trait of 'honesty' was an integral part of her defense and was clearly placed before the jury by the six character witnesses and by Dr. Johnson's own testimony."

One difficulty with that argument was that the government's hearsay reports alleging specific dishonest acts did not constitute the "proof" that Fed. R. Evid. 405(b) permits. In each of the illustrative cases cited by the government, the specific instance of wrongdoing had been fully and competently established. In the case at bar, the damaging suggestion of dishonesty was Pemberton's (hearsay) assertion that unnamed patients of the petitioner had told him they did not receive services for which she had billed Medicaid.

The court below side-stepped these arguments and based affirmance solely on the second sentence of Rule 404(b) which the government's brief had not mentioned.

The second sentence of Rule 404(b) permits evidence of other crimes, wrongs or acts "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Labeling Pemberton's suggestions of Medicaid fraud as evidence of the

petitioner's "state of mind"[2] and not as evidence of other crimes, wrongs or acts offered to show the petitioner's character, the court below ingeniously held that the testimony was admissible for a purpose other than the proof of character which Rule 404(b) proscribes. We submit that the resulting conflict with the inhibitory first sentence of Rule 404(b) is made no less violent by the court's unrealistic reference to "character" or to the character trait of dishonesty as "state of mind", and that this Court should not permit the departure, in this case, from the rule of evidence which has long been followed in the court below, and in other circuits as well, and which has been clearly stated in the Federal Rules of Evidence.

An accused has a time-honored right to submit in his defense his good general reputation. It was not the intent of the Federal Rules of Evidence to chill the exercise of that right by requiring the accused to be prepared to defend against every possible suggestion of his wrongdoing at any time in his life.

---

2. In some criminal prosecutions, the defendant's state of mind at the time of the forbidden act may be material; but proof of his state of mind on some other occasion would not be relevant.

II.

By overlooking the underlying facts and a pertinent ruling of the trial judge, the majority avoided the constitutional problems in this case.

The indictments charged income tax evasion in violation of 26 U.S.C. §7201. To rebut the petitioner's showing of her good general reputation, the government called its witness Pemberton who testified as follows:

> "Dr. Johnson's . . . patient medical charts . . . showed that [she] had billed for medical services which were not in the chart. In talking with recipients who had received services it also showed that the medical charts substantiated services that the recipients alleged not to have received." (V-T237).
>
> "Dr. Johnson had billed for and signed Medicaid claims for services that were not documented in the medical chart. And if I may, I would like to clarify, as a requirement of Medicaid any services that are billed must be substantiated in the medical chart, or those funds are reimbursable to the Federal Government.
>
> THE COURT:
>
> Q. And then you checked with some of the patients? A. Yes, sir.
>
> Q. And found out that the services were not rendered? A. In talking with the recipients they stated they had not received certain services which were billed by Dr. Johnson." (V-T238).

The thrust of Pemberton's testimony was that his investigations and inquiries indicated the petitioner's commission of Medicaid fraud (a violation of 42 U.S.C. §1396h). The court's "cautionary" action or instruction to the jury was "whether or not fraudulent claims had been filed for Medicare would be up to you to determine . . ." (VI-T11). Nothing in the opinion of the majority refers to either of the foregoing quotations from the record. The court's "finding no merit in the defendant's other contentions" neatly sweeps them under the rug.

The government's introduction of evidence tending to show the petitioner's guilt of crimes other than those charged in the indictments was a deliberate violation of the petitioner's due process right "to be tried upon competent evidence, and only for the offense charged." *Boyd v. United States,* 142 U.S. 450, 458 (1892); *Lovely v. United States,* 169 F. 2d 386 (4th Cir. 1948); *see Lane v. Warden, Maryland Penitentiary,* 320 F. 2d 179 (4th Cir. 1963).

Moreover, Pemberton's accusations, being unrelated to the charges in the indictment, were in violation of the petitioner's Sixth Amendment right "to be informed of the nature and cause of the accusation" and, insofar as he related what he had been told by some unnamed patients, his testimony violated the petitioner's Sixth Amendment right "to be confronted with the witnesses against [her]." In fact, a purpose and effect of all of Pemberton's testimony was to deprive the petitioner of her Sixth Amendment right to "trial by an impartial jury." *Cf., Lane v. Warden Maryland Penitentiary, supra,* where "the reading to the jury, at the commencement of Lane's trial, of that portion of the indictments relating to his prior convictions destroyed the impartiality of the jury and denied him due process of law." (320 F. 2d at 179).

The petitioner did not knowingly and intelligently waive these rights which were personal to her [*Johnson v. Zerbst,* 304

U.S. 458, 464 (1938); *Fay v. Noia*, 372 U.S. 391, 439 (1963)]; and she specially claimed in the court of appeals her right to due process of law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5272

United States of America,

Appellee,

versus

Eileen Eldorado Johnson,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. James C. Turk, District Judge.

Argued August 19, 1980. Decided November 12, 1980

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

S.W. Tucker (Hill, Tucker & Marsh; J. Hugo Madison on brief) for Appellant; John S. Edwards, Assistant United States Attorney (Faye S. Ehrenstamm, Assistant United States Attorney on brief) for Appellee.

Opinion

PHILLIPS, Circuit Judge:

Convicted by a jury of federal income tax evasion under 26 U.S.C.A. §7201, Eileen Eldorado Johnson unsuccessfully moved in the district court for a new trial, on the grounds that evidence of her overstated Medicaid billings was improperly admitted and that government counsel's reference to her "fraudulent" Medicaid forms unduly prejudiced the jury. We affirm, holding that the extrinsic acts evidence was properly admitted under Fed. R. Evid. 404(b) and that no prejudice resulted from the "fraudulent" reference in view of the trial court's corrective action.

I

Johnson is a medical doctor, who inherited her practice from her deceased brother. She filed tax returns for 1972, 1973, and 1974, which understated her income by approximately $120,000.00 and her tax liability by approximately $31,000.00. Her defense at trial was inadvertence: she had had nothing to do with preparing her tax returns because she cared nothing for money and chose, instead, to devote her time to the demanding personal needs of her patients. To support this defense she produced seven local witnesses — three physicians, a school board member, a public school teacher, a mortician, and a minister — who testified to her truthfulness, honesty, and compassion, and to the busy nature of her practice.

In attempted rebuttal of this portrait of Johnson as an altruistic healer of the sick, whose concerns lay elsewhere than attending to her financial interests and resulting legal responsibilities, the government called Robert Pemberton, an auditor for the U.S. Department of Health, Education &

Welfare. Pemberton testified at length about his investigation of Johnson's billings for Medicaid services for 1976-78. His study showed that Johnson reported four times as many services per patient as other Virginia doctors. Johnson did not object to the general course of Pemberton's testimony. In fact, the following day Johnson again took the stand in order to testify that she had not signed the Medicaid billings upon which Pemberton had based his investigation. During cross-examination, government counsel asked Johnson, "Who would have received the benefit of all the fraudulent forms for Medicaid that were filed?" Johnson's counsel objected and moved for a mistrial because use of the term, "fraudulent," unduly prejudiced the jury. The trial judge overruled the motion, directed government counsel to rephrase the question, and gave the jury a cautionary instruction.

II

We hold that Pemberton's testimony was admissible under Fed. R. Evid. 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The first sentence of Rule 404(b) brings forward the traditional rule that extrinsic acts evidence is inadmissible solely to prove that defendant is a bad character and, therefore, likely to have committed the crime charged. *See, e.g., Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Woods*, 484

F.2d 127 (4th Cir. 1973); *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948); Advisory Committee Notes to Fed. R. Evid. 404(b); McCormick, *Evidence* §190, at 447 (2d ed. 1972). Extrinsic acts evidence, however, may be admissible for other purposes including those listed in Rule 404(b). The Rule's list is merely illustrative, not exclusive, Wright & Graham, *Federal Practice and Procedure: Evidence* §5240, at 469 (1978).

Rule 404(b) of course commits to trial judge discretion the determination whether extrinsic act evidence shall be admitted under its second sentence. In exercising that discretion the judge first must determine if the proffered evidence is relevant to an issue other than the accused's character. If so, then the trial judge must balance the evidence's probative value against the dangers of undue prejudice aroused by this form of evidence. This may concededly pose particularly difficult problems. The Advisory Committee Notes to Rule 404(b) state:

> No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403 [confusion of issues, misleading the jury, undue delay, waste of time, and needless presentation of cumulative evidence].

Within this general guideline for the exercise of trial court discretion, we think the evidence here challenged was properly admitted. The general prohibition contained in the first sentence of Rule 404(b) is designed to prevent prosecutorial overreaching by a means whose obvious effectiveness has made it an

inescapable temptation for advocates over the years. The second sentence however reflects the perception that evidence of "other . . . acts" may sometimes be critical to proof on a dispositive issue related to a defendant's state of mind. The ambivalence reflected in the Rule but serves to emphasize the particular delicacy of the discretionary rulings its administration may require. There is no gainsaying that the ruling here posed just such a problem for the trial judge, but we think he properly resolved it.

Particularly where, as here, a defendant in a criminal case by her own testimony and that of others has deliberately sought as the primary means of defense to depict herself as one whose essential philosophy and habitual conduct in life is completely at odds with the possession of a state of mind requisite to guilt of the offense charged, that defendant may be considered in effect to have forfeited any protection that the first sentence of the Rule might otherwise have provided against the type of "other act" evidence here challenged. *See Walder v. United States*, 347 U.S. 62 (1954). In such circumstances, testimony such as that of Pemberton may well be the only effective way to rebut evidence designed generally to plant in the jury's mind a reasonable doubt that such a person could have possessed the culpability of mind requisite to convict of the crime charged. Balancing the probative value of the challenged evidence against its potential for unfairly prejudicing the defendant, and on the latter point taking into account that the defendant deliberately chose to base her defense upon evidence not otherwise effectively rebuttable, we conclude that the district judge's admission of Pemberton's evidence lay well within the bounds of the discretion reposed in him.

III

We think that government counsel's unfortunate reference to "fraudulent" medicaid forms was sufficiently corrected by the trial judge's cautionary actions so that the risk of prejudice was adequately removed.

Finding no merit in the defendant's other contentions, we affirm.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent and would grant a new trial.

Assuming that the evidence of other acts is admissible for one purpose or another, and I think, after *United States v. Woods*, 484 F2d 127 (4th Cir. 1973), even taking into consideration the later advent of the new rules, the admissibility of such evidence is pretty well entrusted in this circuit to the almost uncontrolled discretion of the trial judge, Pemberton's most damning testimony is not considered by the majority in its opinion.

Pemberton testified that Dr. Johnson had billed for specific services not rendered, and he ascertained that fact by asking the patients involved. Thus, the false billing he concluded Dr. Johnson had done was proved by statements other than those made by the declarant while testifying at a trial or hearing and offered in evidence to prove the truth of the matter asserted. This is hearsay pure and simple under FRE 801(c) and inadmissible under FRE 802, for it is not subject to any exception as to which I am advised.

An example follows:

"THE COURT:

Q. And then you checked with some of the patients?

A. Yes, sir.

Q. And found out that the services were not rendered?

A. In talking with the recipients, they stated that they had not received certain services which were billed by Dr. Johnson."

Specific instances of conduct, whether offered to rebut a defense to the merits, as the majority treats it, or whether offered to rebut a defense of good character, I think may no more be proved by hearsay than any other essential fact in the case.

The testimony I have quoted is only a part of that introduced; other evidence is equally as inadmissible. It may only be considered highly prejudicial, and its admission should warrant a new trial.

ORDER OF THE UNITED STATES COURT OF APPEALS DATED DECEMBER 17, 1980

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5272

United States of America,

Appellee,

versus

Eileen Eldorado Johnson,

Appellant.

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Russell. Judge Widener dissents. He would grant rehearing and a new trial for the reasons expressed in his dissenting opinion.

For the Court,

s/ William K. Slate, II
CLERK

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No. 80-1213

In the Supreme Court of the United States

OCTOBER TERM, 1980

EILEEN ELDORADO JOHNSON, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1213

EILEEN ELDORADO JOHNSON, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of her conviction for attempted income tax evasion, claiming that the government's rebuttal evidence, which indicated that petitioner had submitted false medicaid billings, violated Fed. R. Evid. 404(b).

1. Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of attempting to evade her personal income taxes for the years 1972, 1973, and 1974, in violation of 26 U.S.C. 7201. Petitioner was fined

$8,000 on each count, with all but $3,500 of the fine imposed upon all counts suspended, and was placed on probation for a period of two years. The court of appeals affirmed (Pet. App. 1a-7a).

After the government concluded its case-in-chief, petitioner presented seven witnesses who testified that her reputation as a law-abiding citizen was good and that she had a good reputation for truth and veracity (V Tr. 98, 101, 105, 107, 110, 116, 232; Pet. App. 2a).[1] All but two of these witnesses were asked whether they knew how busy petitioner was in her practice, and they responded that she was very busy and worked long hours (V Tr. 97, 101-102, 107-108, 116, 232; Pet. App. 2a). Petitioner testified that her staff did all of the financial work and that she kept no records (V Tr. 127-129); that her returns were prepared by others and that she simply signed them without studying them (V Tr. 132); that she never had anything to do with the receipts from her practice (V Tr. 139); and that she was never curious as to how much money she was making from her practice because she was interested in medicine, devoted all of her time to it, and never paid any attention to the financial aspects of her business (V Tr. 147-148).

In rebuttal, the government called Robert Pemberton, an auditor for the United States Department of Health, Education, and Welfare, who testified that he had determined after investigation that during the period from February 1976 through January 1979 petitioner had billed the federal government and received payment for medical services that were

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[1] "Tr." refers to the transcript of trial proceedings. "J. App." refers to the joint appendix filed in the court of appeals.

not reflected on her patients' charts and that her patients said they had not received (Pet. App. 2a-3a; V Tr. 236-237). Based upon his investigation, Pemberton concluded that petitioner's truthfulness was questionable (V Tr. 238-239).

The petitioner testified again, and on cross-examination the government asked: "Who would have received the benefit of all the fraudulent forms for Medicaid that were filed?" Petitioner objected to the characterization of the forms as fraudulent and moved for a mistrial (J. App. 25). The court denied the motion and gave the following cautionary instruction to the jury (J. App. 28):

> Ladies and gentlemen of the jury, whether or not fraudulent claims had been filed for Medicare would be up to you to determine from that, not what any of the attorneys say. You understand that, all of you understand, you disregard the last question that was asked.

2. Relying on Fed. R. Evid. 404(b), petitioner argues (Pet. 5-10) that Pemberton's testimony was inadmissible because it constituted evidence of specific misconduct used to prove the bad character of the defendant.[2]

---

[2] Petitioner also asserts (Pet. 12) that Pemberton's testimony and the trial court's cautionary instruction to the jury indicating that they were to determine whether or not petitioner's billing practices were "fraudulent" violated her rights to be informed of the nature of the charges against her and to be tried only for the offense charged. Petitioner was tried for and convicted of the charges in the indictment, *i.e.*, attempted income tax evasion. The trial court simply directed the jurors to ignore the prosecutor's characterization of the evidence, and, in evaluating the significance of Pemberton's testimony as it related to petitioner's defense of inadvertence, to make their own determination of whether petitioner had engaged in "fraudulent" billing practices.

Rule 404(b) provides:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Petitioner argues that she merely introduced testimony concerning her reputation for truth and veracity and as a law-abiding citizen (see Fed. R. Evid. 404(a)(1), 405(a)) and that the government was precluded from using specific acts of misconduct to rebut this evidence. However, petitioner went beyond merely attempting to establish that the general estimate of her character was so favorable that it could be inferred that she would not be likely to commit the offense charged. See *Michelson* v. *United States*, 335 U.S. 469, 476 (1948). Rather, as the court of appeals recognized (Pet. App. 2a, 5a), through her own testimony, and that of others, petitioner attempted to depict herself as having had nothing to do with the preparation of her tax returns because she cared nothing for money, having chosen, instead, to devote her time to the demanding personal needs of her patients. Under these circumstances, the district court did not abuse its discretion under Rule 404(b) in permitting the government to introduce evidence of other acts suggesting that petitioner's characterization of herself as a person who cared nothing for money was not credible and that she had possessed the state of mind requisite to guilt of the offense charged. See, *e.g.*, *United States* v. *Jacobson*,

578 F.2d 863, 866-867 (10th Cir.), cert. denied, 439 U.S. 932 (1978).[3]

Moreover, as the court of appeals noted (Pet. App. 3a), petitioner did not make timely objection to this testimony. Although petitioner's counsel objected to Pemberton's testifying to the results of any general study by HEW (V Tr. 234), he specifically indicated that he had no objection to the witness' testifying as to what he knew (V Tr. 235), to what the witness discovered during his investigation (V Tr. 235, 237), or to the government's bringing out specific instances of conduct (V Tr. 236). The failure to make timely objection to the admission of the evidence waived any challenge petitioner might have been entitled to raise concerning the admission of the evidence, absent plain error affecting substantial rights. *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Elmore*, 423 F.2d 775, 777 (4th Cir.), cert. denied, 400 U.S. 825 (1979). See also Fed. R. Evid. 103 (a)(1), 103(d); Fed. R. Crim. P. 52(b).

The admission of Pemberton's testimony, even if error, did not affect petitioner's substantial rights.

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[3] Petitioner's reliance (Pet. 6-9) on *United States* v. *Benedetto*, 571 F.2d 1246 (2d Cir. 1978); *United States* v. *Reese*, 568 F.2d 1246 (6th Cir. 1977); *United States* v. *Curry*, 512 F.2d 1299 (4th Cir.), cert. denied, 423 U.S. 832 (1975); *United States* v. *Davenport*, 449 F.2d 696 (5th Cir. 1971); and *Eley* v. *United States*, 117 F.2d 526 (6th Cir. 1941), is misplaced. In *Curry*, *Davenport*, and *Eley*, the courts simply held that evidence of specific misconduct was inadmissible to show bad character. Similarly, in *Reese* the court noted that evidence of specific misconduct was inadmissible to show bad character, but held that the evidence in question was admissible on the issues of knowledge and intent. In *Benedetto*, the court concluded that the evidence of specific misconduct was inadmissible to show knowledge and intent since those issues were not seriously disputed, but held the evidence admissible on other grounds.

It was not contested at trial that petitioner's tax returns for the three years at issue substantially understated her taxable income and that there was a resulting understatement of tax liability for the years at issue of approximately $31,000. Petitioner's sole defense was that she had nothing to do with the financial aspects of her medical practice, entrusting that chore to her employees. There was, however, testimony from one of petitioner's employees that petitioner was intimately involved in the preparation of the summaries that were given to petitioner's accountant to serve as the basis for preparation of her tax returns (II Tr. 112-113). This testimony was corroborated by the petitioner's handwritten notations on the summaries (II Tr. 114-115; V Tr. 155, 161-164). Under these circumstances, there is little likelihood that Pemberton's testimony had any substantial effect on the jury's verdict.[4]

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[4] Nor is there any merit in petitioner's suggestion (Pet. 12) that the admission of Pemberton's testimony denied her the Sixth Amendment right to confront the witnesses against her because Pemberton had related the hearsay responses of petitioner's clients. Petitioner made no objection to that testimony at the time upon the ground that it violated her Sixth Amendment right, and, therefore, such "testimony, even * * * [if] improper, * * * [became] part of the record and * * * [was] available to be considered for its probative value by the trier of fact." See *United States* v. *Fowler*, 608 F.2d 2, 8 (D.C. Cir. 1979), quoting *United States* v. *Jamerson*, 549 F.2d 1263, 1267 (9th Cir. 1977). Furthermore, the hearsay statements of petitioner's clients apparently only confirmed what was obvious from their charts, namely, that they had not received all of the treatment for which the federal government had been billed; therefore, admission of the statements cannot constitute "plain error." Fed. R. Crim. P. 52(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

I

The Relative Importance Of The Issues

The petitioner argues that the government's rebuttal evidence violated Fed. R. Evid 404(b) because (and only because) the majority below held, as its sole basis for affirmance, that Pemberton's testimony was admissible under that rule. The opinion's distortion of the rule is patently grievous; particularly where, to

avoid rejecting evidence insinuating other crimes, wrongs or acts of dishonesty, the court unrealistically held that such evidence does not show character or a trait of character but shows "state of mind" or "culpability of mind". Of even greater fundamental importance, however, are the blind eye and deaf ear which the court below turned to the petitioner's assertion of her right not to be deprived of liberty or property without due process of law.

The paramount question in this case is whether this Court will countenance the government's deliberate preparation and presentation of inadmissible testimony which was clearly intended to destroy the impartiality of the jury by "trying" the petitioner for a crime not charged in the indictment, and by doing so without

confronting the petitioner with the witnesses against her.

II

The Government Had No Lawful Justification For Calling Its Rebuttal Witness

In the trial court, the purpose for the rebuttal testimony was stated viz:

> "We intend to use Mr. Pemberton as a character witness. They have introduced character testimony and we are entitled to come back and rebut it." (V-T234-5).

Unquestionably, the government was entitled to contradict, if it could, the testimonies of the seven witnesses who had shown the petitioner's good general reputation as a truthful and law abiding citizen. Had none of these witnesses testified, the government would not have had a pretense for calling Mr. Pemberton. Fed. R. Evid. 404(a)(1). Nevertheless,

the attorneys for the government called their so-called rebuttal character witness, knowing full well that he could say nothing contrary to what had been said concerning the petitioner's general reputation.

Here, the government adopts the "state of mind" concept which the majority below has ingeniously grafted on to the "other purposes" aspect of Fed. R. Evid. 404(b); and it suggests, as a precedent, United States v. Jacobson, 578 F.2d 863, 866-867 (10th Cir.), cert. denied, 439 U.S. 932 (1978). In that case, however, the government's rebuttal witness, Koch, was called not to off-set a showing of good general reputation, but to directly contradict the defendant's denial of involvement in the amphetamine traffic. Having been one of the defendant's partners in the illegal drug business and in the

automobile sales business as well, Koch was a competent witness to prove that the defendant had lied when he denied having ever traded in illegal drugs. Such evidence of another crime not charged in the indictment was clearly admissible under the "other purposes" aspect of Fed. R. Evid. 404(b). "The trial court correctly instructed the jury that the evidence was to be considered only as it related to intent, plan, knowledge, identity or absence of mistate or accident * * * [and] added that the defendant was not to be tried or convicted of any crime not charged in the indictment." (578 F.2d at 866-867; emphasis added.)

On direct exmination, the petitioner had said that she never prepared a tax return; that when her returns had been prepared, she signed without studying them; and that had she known they were

inaccurate, she would not have signed them. On cross-examination, she disclaimed knowledge of the amount of her gross receipts or of the accuracy or inaccuracy of the government agent's calculations of her total receipts or investments. She testified in detail as to the business procedures of her office and as to her participation and the participation of her employee in assembling the data from which her tax returns were prepared. The attorneys for the government knew that Mr. Pemberton could not contradict anything to which the petitioner had testified. Before they arranged for Pemberton's presence at the trial, they knew (as it became apparent to defense counsel before Pemberton had answered eight introductory questions) that his testimony could not possibly be rebuttal of anything.

III

The Government's Deliberate Frustration Of Petitioner's Constitutional Protection Is Not Offset By The Unfounded Suggestions Of Perjury

To justify the result below, the majority interpreted the petitioner's testimony as maintaining that "she had had nothing to do with preparing her tax returns" (Pet. App. 2a). Here, the government sounds the same note in its summary of the petitioner's testimony--"that her returns were prepared by others and that she simply signed them without studying them" (Memo for U.S., 2). A suggestion that the petitioner had perjuriously disavowed all personal participation in the preparation of her returns is most powerfully made by the government on page 5 of its Memorandum where it cites the testimony of petitioner's employee, "corroborated by the petitioner's handwritten

notations", to show that petitioner was intimately involved in the preparation of the summaries from which her tax returns were prepared.

The petitioner's involvement in the preparation of such summaries is accurately reflected in the second paragraph of her Statement of Facts (Pet., 5) where a pertinent sentence from her testimony is quoted, viz: "When it was time to prepare the income return Mrs. Allar kept the figures and we prepared it [the summary] together and she would tell me what headings to put, and that's how it was done at the last minute".

Petitioner's testimony shows that she does not know how to use the adding machine in the office (V-T129); that from the log and from the book for the Medicare, Medicaid and Blue Cross and Blue Shield accounts, Mrs. Allar would add up

the receipts "and put it on little bits of paper" or, sometimes, call it off to the petitioner (V-T127-128). Together they went through the petitioner's check-book to figure out deductions (V-T155-156) which they would schedule, using the for-mat which petitioner's brother had used, the headings being written sometimes by the petitioner and sometimes by Mrs. Allar. (V-T154). After Mrs. Allar had prepared a rough draft of a given summary, the pe-titioner made adjustments and changes, deleting items which should not have been included and adding items which should not have been left off. (V-T156-157). Nowhere can we find that the petitioner ever denied her involvement in the preparation of the tax summaries as is inferred on pages 2 and 6 of the Memorandum in Opposition.

The Solicitor-General's preoccupation with Pemberton's testimony has led him

to conclude, contrary to fact, that the petitioner denied having had any part "in the preparation of the summaries that were given to petitioner's accountant to serve as the basis for preparation of her tax returns" (Memo for U.S., 6). This demonstrates the virtual certainty that Pemberton's testimony had the very substantial effect on the jury's verdict that the government's trial attorneys intended it to have. Moreover, the errors in offering and in admitting this testimony have constitutional dimension and, hence, the effect on the jury's verdict would be entirely beside the point.

IV

The Government's Deliberate Frustration Of Petitioner's Constitutional Protections Is Not Offset By Suggestions Of Waiver By Counsel

A

The government argues that petitioner's trial counsel, Mr. Rosenberger, "waived

any challenge petitioner might have been entitled to raise concerning the admission of evidence, absent plain error affecting substantial rights" (Memo for U.S., 5). In support of its claim that some or all of the spontaneous utterances of trial counsel constituted waiver, the government cites Lawn v. United States, 355 U.S. 339 (1958); United States v. Elmore, 423 F.2d 775, 777 (4th Cir.), cert. denied 400 U.S. 825 (1970); and United States v. Fowler, 608 F.2d 2, 8 (D.C. Cir. 1979) as it cites United States v. Jamerson, 549 F.2d 1263, 1267 (9th Cir. 1977).

In Lawn, both the opinion of the Court and the concurring and dissenting opinion vividly reflect the Court's unanimous concern that there must be a conscious and intentional waiver of objection to evidence which bears a taint of unconstitutionality. In United States v. Elmore,

the Fourth Circuit found that the challenged notebook was not the defendant's property wherefore its use did not violate any constitutional stricture and, further, that a conscious and knowing relinquishment of any right to have the notebook suppressed was evidenced by the defense counsel's affirmative statement that he did not object to the use of the notebook which, in a pre-trial proceeding, the court had indicated he would"probably" admit into evidence.

To the extent that United States v. Jamerson is cited and followed in United States v. Fowler, no constitutional problem attended the hearsay testimony concerning the defendant's attempt to cross the Canadian border. And no taint of unconstitutionality attended the evidence in the Fowler case concerning the financial condition of the defendant Gibson.

After quoting from the Jamerson holding:

> "If testimony, even though improper, is introduced into evidence without objection, it becomes part of the record and is available to be considered for its probative value by the trier of fact",

the Fowler court added this caveat:

> "Courts will make an exception to this rule 'only if the admission of the testimony constituted plain error affecting substantial rights'" (608 F.2d at 8).

If, as petitioner contends, the admission of Pemberton's testimony violated her Sixth Amendment rights, such testimony could not have been "available to be considered for its probative value" unless the petitioner herself had knowingly and intelligently waived the protection of the Amendment.

B

Putting aside, for the moment, the plainness of the error and the substantiality of the rights thereby affected, we

look at the record of everything said by petitioner's trial counsel, Mr. Rosenberger, while the government's rebuttal witness was under direct examination:

> "MR. ROSENBERGER: We object to this general policy of study by HEW. It's not rebuttal of anything. It couldn't possibly be.
>
> * * *
>
> "MR. ROSENBERGER: He says it is rebuttal testimony, and he can ask him directly what it is [V-T234]
>
> * * *
>
> "MR. ROSENBERGER: I have no objection to your asking the direct question
>
> * * *
>
> "MR. ROSENBERGER: I object to 'our review'. I have no objection to this witness testifying to what he knows.
>
> "THE COURT: Or what his investigation revealed.
>
> "MR. ROSENBERGER: Yes, I have no objection to what he knows at all. [V-T235]

* * *

"MR. ROSENBERGER: OK. Just say what you did.

* * *

"MR. ROSENBERGER: Excuse me, your Honor. I would like to know when it [a review of Dr. Johnson's medical services for the period covering through March of 1979] started, to see if it has anything to do with the period under investigation.

"THE COURT: I think once you put the character in issue, then the Government would have the right to bring out specific instances, and so we're talking about her character and all at the present time, I assume.

"MR. ROSENBERGER: I have no objections to that. I just wanted to know what period it covered. [V-T236]

* * *

"MR. ROSENBERGER: Your Honor, please. I object to his recommendations. I have no objection to his saying what he found. Not at all. [V-T237]".

Counsel's first objection was that the HEW "studies to determine potentials for

fraud in the Medicaid programs" couldn't possibly be rebuttal of anything. He had no objection to "the direct question", i.e. to a question phrased to elicit the general reputation for peace and good order or for truth and veracity. From this position he had retreated but slightly, before the court gratuitously ruled that the government would have the right to bring out specific instances. Taking his cue from the court's ruling and having answered the court's next question: "What period of time are you talking about?", the government's agent hastily volunteered testimony insinuating other crimes, wrongs, and acts of dishonesty. Doubtless, the subsequent remarks of petitioner's trial counsel, which the government now argues constituted waiver, were his effort to avoid projecting to the jury a purpose on his part to keep facts from them.

C

To whatever extent the government may properly argue that petitioner's trial counsel effected a waiver of her right to challenge Pemberton's testimony, to that extent it would follow that she was without "the [effective] assistance of [competent] counsel for [her] defense", which the Sixth Amendment requires in all criminal prosecutions. Petitioner's due process right was violated not by the fault of her counsel, but by the government's contrivance to taint her trial with testimony it knew to be forbidden by Fed. R. Evid. 404(b) and by the Constitution.

CONCLUSION

To minimize the importance of this case, the government suggests that the petitioner was merely fined and placed on probation (Memo for U.S., 1-2). In fact, the peitioner was convicted of a felony;

imposition of sentence being suspended. By virtue of §54-317(9) as incorporated in §54-316(3) of the Code of Virginia, 1950, as amended, such felony conviction constitutes sufficient evidence of immoral or unprofessional conduct to warrant revocation of the petitioner's certificate or license to practice medicine.

The severity or leniency of the penalty has no bearing on the basic question in, or on the importance of, this case. The commands of the Constitution, and those of the Federal Rules of Evidence as well, peculiarly enjoin attorneys for the government, as well as the courts, that no one should be deprived of life, liberty, good name and reputation, or property, except in accordance with the law of the land.

Respectfully submitted,

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